

3. Whether the ALJ exceeded her authority in granting benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant began his employment with respondent in January of 1985 and continued until his last day, March 1, 2005. As a working shop foreman, claimant's duties during that time included supervising, as well as building and installing cabinets, sanding and moving cabinets.

Claimant had injured his upper extremities while employed with respondent, settling a prior workers compensation claim in Docket No. 1,003,641, on November 5, 2002, for a 22.5 percent permanent partial general disability on a running award. Dr. Murati, in his report of May 23, 2002, assessed claimant a 25 percent whole person impairment pursuant to the fourth edition of the *AMA Guides*¹ and returned claimant to work with restrictions against climbing ladders, crawling, frequent repetitive hand controls and occasional repetitive grasping and grabbing, and cautioned against above shoulder work, lifting, carrying, pushing and pulling over 50 pounds occasionally or 35 pounds frequently, and no work more than 24 inches from the body. Dr. Murati also cautioned against the use of hooks, knives and vibratory tools. However, after returning to work with respondent, claimant routinely exceeded these restrictions. Respondent notes that claimant could physically control his activities while at work being in a supervisory capacity and that claimant never complained of pain nor asked for any type of medical treatment through his last day worked.

Claimant's employment with respondent terminated on March 1, 2005, when respondent's business closed. Respondent owners Michael Erney and Earl Dirks testified that it was out of business and was struggling mightily to pay off its financial responsibilities. Respondent acknowledged that it had insufficient funds to pay for workers compensation benefits, if awarded in this matter.

This matter initially went to preliminary hearing on May 10, 2005, before Administrative Law Judge Thomas Klein. At that time, claimant was denied medical treatment when Judge Klein determined that claimant had suffered an intervening accident and injury as a result of subsequent employment activities. The matter was appealed to the Workers Compensation Board (Board). That determination by Judge Klein was reversed by the Board in its August 22, 2005 Order, after the Board determined that

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

claimant's symptoms, including his worsening condition, were not a direct and natural consequence of his prior work-related injury. Rather his subsequent work activities for respondent permanently worsened or aggravated his preexisting condition, resulting in a new series of accidents. Respondent, in the Board's Order, was instructed to provide claimant with a list of three names from which claimant could select one to be his authorized treating physician.

Respondent, rather than follow the orders of the Board, denied claimant medical treatment, referring claimant only to board certified orthopedic surgeon Pat D. Do, M.D., for an evaluation on October 25, 2005. Dr. Do, in his report of that date, determined that claimant's problems within a reasonable degree of medical probability, were aggravated by claimant's participation in his lawn and landscaping business, as well as his employment as a cabinet maker in his new job with Boone's Cabinets. Claimant, however, testified that his employment with Boone's Cabinets did not aggravate his condition, although he also acknowledged that his condition was not improving after leaving the employment of respondent. Claimant testified that Boone's Cabinets does accommodate him with the heavy work and that he can leave early if his pain increases or if he has difficulties performing the job duties.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.²

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.³

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.⁴

An accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.⁵

In this instance, the Board agrees with the ALJ's determination that claimant suffered additional injury while in his continued employment with respondent. Claimant

² K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

³ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁴ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

⁵ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

returned to work for respondent, after the 2001 injury and the 2002 settlement, with specific restrictions. However, those restrictions were apparently violated, causing claimant additional injury through his last day worked on March 1, 2005. As has long been the law in Kansas, the date of accident in this case will be the last day claimant performed the physical activities with respondent which led to his injuries.⁶

The Board notes that respondent and its insurance carrier Liberty Mutual argue that claimant's injuries were aggravated both by his employment at Boone's Cabinets and by his periodic work in his lawn mowing business. However, claimant's testimony is uncontradicted that claimant is able to accommodate his work at Boone's Cabinets, with Mr. Boone being willing to perform the more physical aspects of the job for claimant. Additionally, claimant testified that his work for his lawn mowing company is very limited, generally only to one day a week. And claimant is able to self limit, stopping any activities which cause him any physical difficulties. The Board finds based upon this record, that claimant's need for ongoing medical care stems from his extended employment with respondent after the 2001 accident and claimant's return to work with respondent as a working foreman.

Respondent and its insurance carrier Liberty Mutual argue that according to certain documents placed into evidence at the preliminary hearings held in this matter, Liberty Mutual does not have coverage. The Board acknowledges there is some indication that Liberty Mutual intended to terminate the workers compensation coverage provided to respondent's cabinet company. Liberty Mutual argues that respondent employer lost its workers compensation coverage when it failed to comply with certain audit requirements of the insurance company.⁷

While respondent/Liberty Mutual provides evidence of lack of coverage, respondent employer, through its owners Mr. Erney and Mr. Dirks, provided testimony that the audit dispute had been resolved, the insurance premiums were paid in advance, and coverage continued through the last day of March, 2005. The Board is unable from this record to determine conclusively whether insurance coverage was available on the date of accident or not. The Board finds, for the purpose of preliminary hearing, that Liberty Mutual did have a legal obligation to provide workers compensation insurance coverage on March 1, 2005, the date of accident in this case. The ALJ's determination that respondent and

⁶ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

⁷ The Board has some concerns about counsel's representation of both respondent and the insurance company, where counsel is arguing that the insurance company has no obligation to provide coverage for that respondent. It is difficult to ascertain how an insurance company can properly defend a respondent in a workers compensation matter while, at the same time, denying liability and attempting to force all of the liability on what the insurance company claims is an uninsured employer.

Liberty Mutual should provide claimant with medical care and, if appropriate, temporary total disability compensation is affirmed by the Board.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated January 3, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2006.

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier (Liberty Mutual Insurance Company)
Richard J. Liby, Attorney for Respondent and its Insurance Carrier (Kansas Manufacturers and Commerce Self Insurance Fund)
James R. Roth, Attorney for the Fund
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director